

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

**PLAINTIFF'S MEMORANDUM REGARDING COURT'S PROPOSED JURY
INSTRUCTIONS**

Plaintiff Christopher Lee Joyner, Jr., by counsel, and pursuant to the Court's request, hereby states as follows regarding the Court's proposed jury instructions.

The Court's Proposed Preliminary Instructions

Plaintiff has no objection to any of the proposed preliminary instructions. Plaintiff believes that Defendants' suggestion to amend Preliminary Instruction No. 3 is duplicative and unnecessary. For Preliminary Instruction No. 4, Plaintiff suggests adding in parentheses in the appropriate locations that the parties have stipulated that both O'Neil and Vickrey were acting under color of state law. Plaintiff agrees with Defendants that the language concerning depositions can be deleted from Preliminary Instruction No. 6.

The Court's Proposed Final Instructions

Plaintiff has no objection to Proposed Final Instructions 1 through 17, though Plaintiff notes that Defendants' objection to Final Instruction No. 16 is rendered moot by the Court's Order on Plaintiff's Motion in Limine (Dkt. No. 77).

For Final Instruction No. 18, as with Preliminary Instruction No. 4, Plaintiff suggests adding in parentheses in the appropriate locations that the parties have stipulated that both O'Neil and Vickrey were acting under color of state law.

Additionally, Plaintiff strongly opposes Defendants' request that Final Instruction No. 18 be amended to add that only official conduct that "shocks the conscience" can amount to a constitutional violation. Plaintiff initially notes that the only authority that Defendants advance for such an instruction is an unpublished opinion from the U.S. Court of Appeals for the Tenth Circuit, *Arnold v. Curtis*, 359 Fed. Appx. 43 (10th Cir. 2009). More importantly, even if *Arnold* was more than merely unreported persuasive case law, Defendants misapprehend the holding in that case. *Arnold* involved a claim brought under § 1983 in which the plaintiff was not a prisoner, but was instead claiming that a police officer violated her substantive due process rights during a physical altercation between the officer and the plaintiff. In contrast, the Fourth Circuit has repeatedly held that "the determination of whether an Eighth Amendment violation has occurred through the use of excessive force in the prison context 'turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm.'" *United States v. Gore*, 592 F.3d 489, 494 (4th Cir. 2010) (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). Plaintiff is aware of no reported or unreported authority in the Fourth Circuit holding that the "shocks the conscience" standard is proper in an Eighth Amendment excessive force claim brought by a prisoner. The Court has proposed an instruction that properly states the elements that must be proved to succeed on an excessive force claim. Accordingly, Plaintiff agrees with the Court's Proposed Final Instruction No. 18 and opposes Defendants' request to modify it.

With regard to Proposed Final Instruction No. 22, Plaintiff asserts that he is entitled to a jury instruction on actual damages that includes the mental and emotional suffering that he has experienced as a result of this incident. 42 U.S.C. § 1997e(e) provides that a prisoner may not bring an action for mental or emotional injury without a prior showing of physical injury. Plaintiff will submit testimony and/or evidence showing that he sustained more than a *de minimis* physical injury as a result of the conduct of the Defendants.

For Proposed Final Instruction No. 24, Plaintiff requests that the instruction be modified to include language indicating that the jury may award punitive damages even if it awards the Plaintiff only nominal damages. *Piver v. Pender County Bd. of Education*, 835 F.2d 1076, 1082 (4th Cir. 1987).

Plaintiff has no objection to any of the other Proposed Final Instructions.

Dated: July 6, 2012

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true copy of the foregoing Memorandum Regarding Court's Proposed Jury Instructions was filed via the Court's CM/ECF System on this 6th day of July, 2012, which provides notification to the following:

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